

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

PROGRESSIVE TRANSPORTATION SERVICES, INC.

and

Case 3-CA-23759

RAYMOND GRIZZARD, An Individual

*Robert Ringler, Esq., for the General Counsel
Heather Boshak, Esq., Grotta, Glassman & Hoffman, P.A., Roseland, New Jersey, for
Respondent*

DECISION

Statement of the Case

MARGARET M. KERN, Administrative Law Judge. This case was tried before me on December 9, 2002¹ in Poughkeepsie, New York. On September 26, a complaint issued based upon an unfair labor practice charge filed on August 7, by Raymond Grizzard against Progressive Transportation Services, Inc. (Respondent). It is alleged that on July 10, Respondent discharged Grizzard because he sought the assistance of a union shop steward. Respondent maintains that Grizzard was a probationary employee who was discharged for repeated work rule infractions. For the reasons set forth herein, I agree with Respondent and recommend the complaint be dismissed.

Findings of Fact

I. Jurisdiction

Respondent admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization Status

Respondent admits and I find the union is a labor organization within the meaning of Section 2(5) of the Act.

¹ All dates are in 2002 unless otherwise indicated.

III. Alleged Unfair Labor Practices

A. Respondent's business

Respondent is engaged in providing public bus transportation in Dutchess County, New York. Respondent operates fixed bus route service as well as paratransit transportation of elderly, handicapped, and medically ill persons. Janice Farinacci is the operations manager and James McKenna is the transportation supervisor. Both are admitted supervisors and agents. Farinacci works from 3:30 a.m. to 1:00 p.m., and McKenna works from 12:00 p.m. to 9:00 p.m.

Since 1988, the International Brotherhood of Teamsters, Local Union No. 445 (union) has represented the drivers, mechanics, and cleaners who work at Respondent's facility in Poughkeepsie, a unit that is presently comprised of 74 employees. Farinacci has been the operations manager since 1988, and has dealt directly with the union and its shop stewards for that entire time.

Chief shop steward Paul Harrison testified probationary employees have no rights under the collective bargaining agreement, and the agreement specifically provides that probationary employees are subject to discharge without recourse. Respondent also maintains a performance code that sets forth progressive disciplinary steps to be administered for infractions such as lateness, absenteeism, unauthorized departure from a work location, and insubordination. Farinacci testified the performance code does not apply to probationary employees. Therefore, with the exception of lateness incidents, all discipline of probationary employees is verbal, not written. Lateness incidents are documented because if an employee successfully completes probation, the number of latenesses accrued during the probationary period counts toward the maximum of five latenesses allowed per year under the terms of the collective bargaining agreement.

Grizzard was hired on May 21 as a driver and commenced his 90-day probationary period. As a new driver, he received his assignments from the rotating board, meaning he did not have a steady route assignment. Each evening when he finished work, he was responsible to check the rotating board to see what his assignment and starting time would be the next day. As with all new drivers, it was Respondent's practice to assign a senior employee, called a "cushion," to accompany Grizzard on every new route he was assigned in order to train him.

B. Grizzard's failure to drive his assigned route

On June 5, Grizzard was assigned to drive two routes, route PT7, a paratransit route that operated in the morning and afternoon, and route 7J, a fixed route that operated from 4:45 p.m. to 5:40 p.m. Grizzard was assigned a senior employee as a cushion for both routes. According to Farinacci, after Grizzard completed route PT7, he went home without permission. Because Farinacci left at her usual time of 1:00 p.m. that day, she was unaware of Grizzard's failure to drive the route.

Grizzard admitted he did not drive route 7J on June 5, but explained that the cushion that had been assigned to him "had to go home or something" and was not available. He testified he went to McKenna and told him he could not drive the route without a cushion, and McKenna told him to go home and he would get someone else to do it. Farinacci testified it was true that the original driver assigned to cushion Grizzard was not available, but that McKenna had assigned a different cushion to accompany Grizzard. Nevertheless, Grizzard went home without explanation.

On June 6, Grizzard was again assigned to drive both route PT7 and route 7J. He was not assigned a cushion for either route.² Since he had been cushioned the day before on PT7, he was able to drive that route, but he was unable to drive 7J because he had not driven it the day before. Grizzard testified he went to McKenna and explained the situation and McKenna told him to punch out and go home. Farinacci testified Grizzard did not have permission from McKenna to leave.

According to Farinacci, she asked Grizzard why he had failed to drive route 7J on June 5 and 6, and his response was that he didn't know he had to do it. Grizzard denied that this conversation took place.

C. Grizzard's complaints about Route 20J

Route 20J is one of the longer, more difficult routes to drive. Grizzard was assigned to route 20J on June 12, 13, 14, 20, 26, July 2 and 5. He testified that after he had been assigned to 20J three days in a row, he spoke with other drivers who told him that usually drivers are not assigned to 20J more than once or twice every two weeks. According to Grizzard, he called Farinacci at home and politely expressed his concern at having been assigned three days in a row. Farinacci explained that he was on the rotating board and it was just a matter of how the rotation went. Grizzard denied challenging Farinacci during this conversation or raising his voice. Grizzard also denied ever complaining again about being assigned to 20J.

Farinacci testified that every time Grizzard was assigned 20J he would complain. One day he became angry and defiant and told Farinacci he had driven 20J the week before and she could not assign him to the route again. Farinacci said he was on the rotating board, and that's what happens. He remained adamant that she could not assign him again. This conversation took place in the kitchen area of Respondent's facility, in the presence of other employees under Farinacci's supervision. According to Farinacci, Grizzard never called her at home.

D. Grizzard's failure to report for work on July 6

New drivers are not assigned to work on Saturdays during the first month of their employment. The first Saturday Grizzard was assigned to work was July 6, and the schedule for July 6 was posted on the evening of July 5. According to Grizzard, on or about July 2, he asked McKenna if he could have July 6 off and McKenna said yes. McKenna supposedly showed him the form employees had to fill out to request time off, but told Grizzard he did not have to bother filling it out. Grizzard did not report for work on July 6. He testified he did not see his name on the schedule that was posted on July 5 because he knew he had already had permission to take the day off and he didn't bother to consult the schedule.

McKenna testified that employees have to submit a written request in order to be granted time off. He denied speaking with Grizzard on July 2, and he denied telling him he did not have to fill out the request form. He did recall Grizzard telling him on the night of July 5 that he could not work the next day because he had previous plans to go to Foxwood's Casino. McKenna told him he was on the schedule for July 6, and he expected him to report to work.

² There was conflicting testimony about whether Grizzard was assigned a cushion on June 6. When Farinacci looked closely at the rotating board for June 6, however, her final conclusion was that he was not assigned a cushion that day.

E. Grizzard's lateness on July 8

On Monday morning July 8, Grizzard punched in one minute late. Farinacci sent him home for the day and issued a written discipline.

On July 9, in separate conversations, Grizzard asked shop stewards Ed Garcia and Harrison if he could be sent home for being on minute late. Both stewards said Respondent had the right to send him home even for such a minor infraction. Harrison told Grizzard that he would nevertheless look into the matter for him. Harrison testified he checked the board and saw that Grizzard was in fact late and that Grizzard was cushioning that day. Harrison decided not to discuss the matter with Farinacci because, under the circumstances, it was within her discretion to send Grizzard home.

On the afternoon of July 9, Farinacci took her concerns about Grizzard to general manager Mike Moore. She told him of Grizzard's failure to drive route 7J, his negative attitude about driving route 20J, his refusal to work on July 6, and his lateness on July 8. Moore told Farinacci to terminate him.³

F. Grizzard's termination on July 10

Grizzard testified that on the afternoon of July 10, McKenna gave Grizzard a termination letter that stated he was terminated for "unsatisfactory performance during probation." When Grizzard asked why he was being terminated, McKenna said he didn't know and that Grizzard would have to talk to Farinacci. Since Farinacci had left for the day, Grizzard was told to come in the following day. Grizzard called Harrison at home and told him he had been terminated.

On July 11, Grizzard met with Farinacci in her office. Farinacci testified she explained to Grizzard the reasons for his discharge, the same reasons she had discussed with Moore. There was no mention of the union or union stewards.

Grizzard's version of this conversation was that when he asked Farinacci why he had been terminated, she said it was because he had gone to the union and the "union guy" had yelled at her. She said she didn't appreciate that and added, "you guys are going to learn that I'm the boss and not the union."

After Grizzard left Farinacci's office, Harrison came to see her. He said Grizzard had called him at home and told him he had been terminated. He said he realized Grizzard was not covered by the collective bargaining agreement, but because "the kid [was] upset," Harrison asked if Farinacci would explain to him what had happened. Farinacci reviewed the reasons for Grizzard's discharge. Harrison said he was unaware of the problems with Grizzard's employment other than his being one minute late on July 8. According to Farinacci, Harrison did not raise his voice during this conversation, and in fact, has never raised his voice to her in all the years she has dealt with him. She explained: "He don't yell at me. I don't yell at him." Harrison's account of this conversation was corroborative of Farinacci's account.

³ Moore is no longer employed by Respondent and did not testify.

IV. Analysis

Farinacci was a very credible witness. She has been managing Respondent's facility for years and in that time, has established a positive working relationship with the union shop stewards. She demonstrated in her testimony that she is understanding of the adjustment new employees undergo, and gives new employees more than several chances to prove themselves. That she ran out of patience with the Charging Party's antics in this case was more than justified and had absolutely nothing to do with union activities.

I credit Farinacci's testimony that Grizzard left work early on June 5 and 6. It is immaterial which senior driver he was paired with on June 5, or whether or not he was assigned a cushion on June 6. The fact is he left work without permission. I further credit Farinacci's testimony that Grizzard complained about being assigned to route 20J, and that he did so repeatedly, defiantly, and in the presence of other employees.

I credit McKenna's testimony that Grizzard did not ask for permission to take July 6 off on July 2. Grizzard had no idea he was going to be assigned to work on July 6 until the evening of July 5 when the schedule was posted. He never filled out a written request form for time off, and his claim that McKenna showed him the necessary form, but then told him not to bother filling it out, was ridiculous.

On July 8, Grizzard punched in late. By his own admission, two shop stewards told him Respondent was within its rights to send him home. The credible testimony of Harrison and Farinacci is that they did not speak with one another about Grizzard's being sent home. Farinacci, therefore, had no knowledge that Grizzard had consulted with either union representative prior to Moore's making the decision to terminate him. It may well be, as the General Counsel argues, that Farinacci and Harrison talked about Grizzard on some other occasion on some other matter, but I wholly discredit Grizzard's claim that the two had an angry exchange regarding Grizzard's lateness. There was no reason for an angry exchange since, by Grizzard's own account, Harrison told him Respondent was within its rights to send him home. Moreover, Farinacci and Harrison have an established professional working relationship that does not involve yelling.

It was not until July 9 that Farinacci learned the details of Grizzard's failure to report to work on July 6. Farinacci considered his failure to show up for work a serious infraction, and given the accumulating number of problems with Grizzard, she consulted with the general manager that same day and the decision was made to terminate him.

Counsel for the General Counsel argues that Grizzard was treated disparately from other employees because he was not progressively disciplined under the terms of the performance code. The credible and uncontradicted testimony of Farinacci and McKenna was that the performance code did not apply to probationary employees.

In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding cases turning on employer motivation. The General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. If the General Counsel is able to make such a showing, the burden of persuasion shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The elements commonly required to support a finding of discriminatory motivation under Section 8(a)(3) are union activity, employer knowledge, and employer animus. *Sears, Roebuck & Co.*, 337 NLRB No. 65 (2002) and cases cited. In this

case, the General Counsel has failed to establish, by a preponderance of credible evidence, that Respondent had knowledge of or harbored animus toward Grizzard's union activity.

For these reasons, I recommend the complaint be dismissed.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not engaged in unfair labor practices as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The complaint is dismissed.

Dated, Washington, D.C.

Margaret M. Kern
Administrative Law Judge

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.